Supreme Court, U.S.
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No. 01-1193

In The

Supreme Court of the United States

CARL YOUNGBLOOD,

Petitioner,

v.

HY-VEE FOOD STORES, INC.,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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1688

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii
REPLY IN SUPPORT OF CERTIORARI 1
CONCLUSION 10

TABLE OF AUTHORITIES

Pages

Cases

Ackaa v. Tommy Hilfiger Company,
1998 WL 136522 (E.D. Pa. 1998) 7

Aiken v. City of Memphis,
37 F.3d 1155, 1176 (6th Cir. 1994) 9

Andrews v. Lakeshore Rehabilitation Hosp.,
140 F.3d 1405 (11th Cir. 1998) 9

Bagley v. Ameritech Corp.,
220 F.3d 518 (7th Cir. 2000) 6

Bobbitt by Bobbitt v. Rage Inc.,
19 F.Supp.2d 512 (W.D. N.C. 1998) 7

Buchanan v. Consolidated Stores Corp.,
125 F.Supp.2d 730 (D. Md. 2001) 7

Calcara v. United States,
53 F.2d 767 (8th Cir. 1931) 8

Callwood v. Dave & Buster's, Inc.,
98 F.Supp.2d 694 (D.Md. 2000) 6

Christian v. Wal-Mart Stores, Inc.,
252 F.3d 862 (6th Cir. 2001) 3, 4, 5

Flowers v. TJX Companies, Inc.,
1994 WL 382515 (N.D.N.Y. 1994) 6, 7

Hill v. Shell Oil Co.,
78 F.Supp.2d 764 (N.D. Ill. 1999) 7

Garrett v. Tandy Corp.,
142 F.Supp.2d 117 (D.Me. 2001) 7

Hampton v. Dillard Dept. Stores, Inc.,
247 F.3d 1091 (10th Cir. 2001),
cert. denied, 122 S.Ct. 1071 (2002) 2, 4, 9, 10

Holmes v. Dillard Dept. Store,
2000 WL 1725082, (E.D. La. 2000) 7

Hickerson v. Macy's Dept. Store,
1999 WL 144461 (E.D. La. 1999) 6

Jeffery v. Home Depot U.S.A., Inc.,
90 F.Supp.2d 1066 (S.D. Cal. 2000) 6

Lewis v. J.C. Penney Co., Inc.,
948 F.Supp. 367 (D. Del. 1996) 7

McCrea v. Saks, Inc.,
2000 WL 1912726 (E.D. Pa. 2000) 6

Morris v. Office Max, Inc.,
89 F.3d 411 (7th Cir. 1996) 6

Nevin v. Citibank, N.A.,
107 F.Supp.2d 333 (S.D. N.Y. 2000) 6

Rivers v. Roadway Exp., Inc.,
511 U.S. 298, 298, 114 S.Ct. 1510 (1994) 9

Shawl v. Dillard's, Inc.,
2001 WL 967887 (10th Cir. 2001) 6

Singh v. Wal-Mart Stores, Inc.,
1999 WL 374184 (E.D. Pa. 1999) 7

Sterling v. Kazmierczak,
983 F.Supp. 1186 (N.D. Ill. 1997) 6

Thompson v. Keohane,
516 U.S. 99, 110-111, 116 S.Ct. 457 (1995) 6

Turner v. Fashion Bug Dept. Store,
205 F.3d 1342 (6th Cir.) 6

Wesley v. Don Stein Buick, Inc.,
42 F.Supp.2d 1192 (D. Kan. 1999) 6

Youngblood v. Hy-Vee Food Stores, Inc.,
266 F.3d 851, 854 (8th Cir.2001) 4, 5, 9, 10

Other Authorities

H.R. Rep. No. 40(I), 102d Cong., 1st Sess. 92 (1991) . . 8, 10

H.R.Rep. No. 102-40(II) 8

REPLY IN SUPPORT OF CERTIORARI

In his petition for certiorari ("PET."), plaintiff, Carl Youngblood, identifies a profound conflict among the circuit courts of appeals. PET. 10-14. That conflict prompted the Eighth Circuit opinion below,[1] which erroneously upholds summary judgment on Youngblood's § 1981 claims. Specifically, the circuit courts of appeals are divided as to whether the "make and enforce contracts" provision of 42 U.S.C. § 1981 pertains to racial discrimination occurring in a contractual relationship after formation of a retail contract (as the plain language suggests), or only to discrimination occurring before the contract is formed. PET. 10-14. Youngblood suggests that because this division between the circuits involves interpretation of our civil rights laws – a recurring question of undisputed importance – this case warrants review by this Court. PET. 14.

Respondent's Brief in Opposition ("OPP.") claims that "Youngblood complains of nothing more than alleged 'erroneous factual findings or the misapplication of a properly stated rule of law.'"[2] OPP. 2. Yet, Respondent, Hy-Vee, dedicates nearly its entire brief to responding that it finds no split among the circuit courts. OPP. 2-23.

The district court below correctly holds that "plaintiff has established ... that Hy-Vee had the requisite intent to discriminate against him" because of his race. PET. A-34. Throughout its Opposition, however, Hy-Vee clings to its

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[1]Judge Richard Arnold filed a dissent. PET. A-7. Judge Morris Sheppard Arnold and Judge William Jay Riley would grant the petition for rehearing. PET. A-59.

[2]Interestingly, Hy-Vee devotes three pages of its brief to its false and contested version of the facts, wrongly adopted below. OPP. 3-5.

pretextual excuse for its racial discrimination, repeatedly referring to "loss prevention practices." In doing so, Hy-Vee seeks to downplay the fact that the district court found sufficient evidence of Hy-Vee's intent to discriminate because of Youngblood's race. PET. A-34.

Hy-Vee divides its argument into three sections, each repeating the same theory – that allegedly there is no conflict among the circuits. Hy-Vee's lead counsel,[3] however, makes the opposite argument regarding the same issue, in a case recently before this Court: *Hampton v. Dillard Dept. Stores, Inc.*, 247 F.3d 1091 (10th Cir. 2001), *cert. denied*, 122 S.Ct. 1071 (February 2002) (Supreme Court Case No. 01-842).[4] In Petitioner's Reply In Support of a Petition for Writ of Certiorari ("DILLARD REP.") counsel argues that:

> "[T]his case implicates a mature circuit conflict because Hampton could not have prevailed if her case were decided under the standards applied by the Seventh, Fifth and *Eighth* Circuits." DILLARD REP. 5 (emphasis added).

In response to the conflict Youngblood points to from the Sixth Circuit (PET. 12), Hy-Vee claims that "all federal courts addressing the issue have held that the actual loss of a § 1981 contract right in the retail environment occurs only when an individual is prevented from making or completing a purchase." OPP. 11. However, in Dillard's Reply Brief in *Hampton*, Hy-Vee's counsel acknowledges the conflicting

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[3]Jack L. Whitacre

[4]At the time of filing, Youngblood's petition made reference to *Hampton*, as "presently" before the Supreme Court. Since the filing date, this Court has denied certiorari for the correct holding from the Tenth Circuit.

standard in the Sixth Circuit, stating:

> [A] plaintiff may recover not only if she were "deprived of services while similarly situated persons outside the protected class were not," *but also* when she actually "received services" but "in a markedly hostile manner and in a manner that a reasonable person would find objectively discriminatory." *Christian v. Wal-Mart Stores, Inc.*, 252 F.3d 862, 872 (6th Cir. 2001). DILLARD REP. 8 (emphasis added).

Hy-Vee also makes the disingenuous claim that "the circuits have done nothing more than apply the identical legal principle: There must be the actual loss of a contract interest...to establish a violation under § 1981." Yet, in Dillard's brief, Hy-Vee's lead counsel points to the *Christian*[5] opinion from the Sixth Circuit, and states, "the importance of *Christian* is that it does not require – as the Seventh, Fifth, and Eighth Circuits do – the actual loss of a contract right." DILLARD REP. 8.

The further suggestion by Hy-Vee that all federal courts have consistently held that the loss of a § 1981 contract right in the retail environment can occur only before a contract is formed, is again, simply not true. Many federal courts have found a basis for § 1981 claims from conduct occurring after formation of a retail contract.[6] In fact, the Eighth Circuit, in its

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[5]252 F.3d at 872.

[6]*Callwood v. Dave & Buster's, Inc.*, 98 F.Supp.2d 694, 703 (D.Md. 2000) ("as amended, Section 1981 provides protection against discriminatory conduct occurring during and after the formation of a contract."); *Perry v. Burger King Corp.*, 924 F.Supp. 548, 552 (S.D.N.Y.1996) (denying motion to dismiss where customer finished and

opinion below, acknowledges that the "Tenth Circuit found a contractual relationship existed after the purchase." *Youngblood v. Hy-Vee Food Stores, Inc.*, 266 F.3d 851, 854 (8th Cir.2001) (citing *Hampton*).

In *Hampton* the Tenth Circuit held that a coupon received by the plaintiff as a result of her purchase "was a benefit of Ms. Hampton's contractual relationship with Dillard's." *Hampton*, at 1105. The court also held that the store violated § 1981 when it took the coupon from Hampton and did not return it. *Id.*, at 1104-1106. This Court denied Dillard's petition for a writ of certiorari on those issues. 122 S.Ct. 1071. Accordingly, it can not be credibly argued that the item received by Youngblood as a result of his purchase was not a "benefit" of his contractual relationship with Hy-Vee. Likewise, Hy-Vee's taking of the item without returning it (or the purchase price), and forcibly removing Youngblood from the store, cannot be consistently permitted under § 1981, when Hy-Vee's motivation was the color of Youngblood's skin. PET. A-34.

Moreover, federal courts have held that the determination of what constitutes a benefit of a retail contract is not a question for the court, but a question of fact for the jury.

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paid for meal and sought to use restaurant's restroom; noting that plaintiff may be "considered to have contracted for food and use of the bathroom... as benefit of contractual relationship); *McCaleb v. Pizza Hut of America, Inc.*, 28 F.Supp.2d 1043, 1049 (N.D.Ill.1998) (denying summary judgment where defendant failed to provide plaintiffs the full benefits of the contract in that they failed to provide them with the proper utensils with which to eat their pizza and created a disturbing atmosphere in which to eat and interfered with the full enjoyment of the contract by driving plaintiffs out before they had completed eating all that they had intended to eat); *Hall v. Pennsylvania State Police*, 570 F.2d 86, 92 (3d Cir. 1978) (§ 1981 obligates commercial enterprises to extend the same treatment to contractual customers "as is enjoyed by white citizens").

Hampton, 247 at 1099 (10th Cir. 2001); *See also, Christian v. Wal-Mart Stores, Inc.*, 252 F.3d 862, 878 (6th Cir. 2001). Determining the intended benefits of a non-written contract involves interpretation of subjective evidence and credibility determinations which are to be made by a jury. *See, Thompson v. Keohane*, 516 U.S. 99, 110-111, 116 S.Ct. 457, 464 (1995). The Eighth Circuit improperly made fact determinations, and incorrectly held – without supporting authority – that the contractual relationship in this retail context ended (and began) at the point of purchase. *Youngblood*, at 854. PET. A-5.

While some federal courts hold that a violation of § 1981 may occur without the actual loss of a contract interest, *see, Christian*, a definite contractual interest was formed in this case when Youngblood made his purchase. That interest was violated when Hy-Vee then took the item purchased – the essence of the contract – away from Youngblood and did not return it. Pet. A-35. Hy-Vee thereby revoked Youngblood's contract interest when it denied him the "enjoyment of all *benefits*, privileges, terms, and conditions of the contractual relationship." 42 U.S.C. § 1981(b).

After Hy-Vee denied Youngblood the benefit of his contract, Youngblood attempted to enforce his contract by asking Hy-Vee to return to him either the item he purchased, or his money. PET. A-17, A-32. Hy-Vee refused Youngblood's attempt to enforce and responded, "You and your people have to pay back double the amount." PET. A-17, A-32. In doing so, Hy-Vee discriminated against Youngblood because of his race (PET. A-34), and refused him the right to "make and enforce contracts" on that basis. § 1981(b).

Hy-Vee seeks to alarm this Court by misrepresenting Youngblood's position. OPP. 6-7. Youngblood, however, does not seek to expand § 1981 to create "a general cause of action for race discrimination," nor to "federalize all aspects of the

retail shopping experience under the notion that § 1981 protects customers from harassment simply by entering a retail store." On the contrary, Youngblood has demonstrated that his specific contract rights were violated by Hy-Vee, and Youngblood merely seeks uniform enforcement of Section 1981 because Hy-Vee denied him the right to make and enforce his contract, as defined by § 1981(b).

Hy-Vee's misdirection continues when it focuses on the requirement that an individual must be "prevented from making or completing a purchase" in cases claiming § 1981 liability for retail customers who "feel" "harassed" or "discouraged" from purchasing, without ever showing an intent to contract.[7] OPP. 10, 11. In those cases, plaintiffs did not state a § 1981 cause of action because they could not show that they attempted to purchase anything, and, therefore, did not form a contractual relationship. This case presents a wholly different issue. Youngblood undisputedly proved his intent to contract for the item he purchased for consumption when he took the item to the register and paid for it. PET. A-16. When Youngblood handed the cashier his money and the cashier accepted it, a contractual relationship was formed. *See, Hickerson v. Macy's Dept. Store*, 1999 WL 144461, *2 (E.D. La. 1999) (when shopping in a store, act of purchasing an item creates a

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[7] *Bagley v. Ameritech Corp.*, 220 F.3d 518 (7th Cir. 2000); *Flowers v. TJX Companies, Inc.*, 1994 WL 382515 (N.D.N.Y. 1994); *Hickerson v. Macy's Dept. Store*, 1999 WL 144461 (E.D. La. 1999); *Jeffery v. Home Depot U.S.A., Inc.*, 90 F.Supp.2d 1066 (S.D. Cal. 2000); *McCrea v. Saks, Inc.*, 2000 WL 1912726 (E.D. Pa. 2000); *Morris v. Office Max, Inc.*, 89 F.3d 411 (7th Cir. 1996); *Nevin v. Citibank, N.A.*, 107 F.Supp.2d 333 (S.D. N.Y. 2000); *Shawl v. Dillard's, Inc.*, 2001 WL 967887 (10th Cir. 2001) (unpublished opinion); *Sterling v. Kazmierczak*, 983 F.Supp. 1186 (N.D. Ill. 1997) (implicating employment); *Turner v. Fashion Bug Dept. Store*, 205 F.3d 1342 (6th Cir.) (unpublished opinion implicating employment); *Wesley v. Don Stein Buick, Inc.*, 42 F.Supp.2d 1192 (D. Kan. 1999).

contractual relationship between buyer and seller), citing, *Morris v. Office Max, Inc.*, 89 F.3d 411 (7th Cir.1996)).

Hy-Vee cites more inapposite cases in which the plaintiffs did not have their purchases taken from them, and did not lose the benefit of a contract, as Youngblood did.[8] Hy-Vee's further prestidigitation focuses on the "special condition" standard for cases dealing with discrimination *before* contract formation.[9] OPP. 11, 12, 23. This case, however, raises an entirely different question: Is the freedom to leave a store with the benefit of a purchase a part of the contractual relationship as defined by § 1981(b)?

Under Hy-Vee's theory and the lower court's exceptionally narrow view, the "contractual relationship" would last only for the brief time between the moment a customer pays for an item, to the instant he or she receives that item back. Accordingly, a retailer's blatant discriminatory conduct would be allowed in the contracting process so long as it did not occur during those few seconds. A similar theory, espoused in *Patterson v. McLean Credit Union*, 491 U.S. 164, 176-7, 109 S.Ct. 2363, 2372-3 (1989) (plaintiff's right to make and enforce contracts in employment consisted only of right to form contract with no § 1981 protection after formation), was expressly overruled by

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[8] *Ackaa v. Tommy Hilfiger Company*, 1998 WL 136522 (E.D. Pa. 1998); *Flowers v. TJX Companies, Inc.*, 1994 WL 382515 (N.D. N.Y. 1994); *Garrett v. Tandy Corp.*, 142 F.Supp.2d 117 (D.Me. 2001); *Holmes v. Dillard Dept. Store*, 2000 WL 1725082, (E.D. La. 2000); *Lewis v. J.C. Penney Co., Inc.*, 948 F.Supp. 367 (D. Del. 1996); *Nevin v. Citibank, N.A.*, 107 F.Supp.2d 333 (S.D. N.Y. 2000); *Singh v. Wal-Mart Stores, Inc.*, 1999 WL 374184 (E.D. Pa. 1999).

[9] *Bobbitt by Bobbitt v. Rage Inc.*, 19 F.Supp.2d 512 (W.D. N.C. 1998); *Buchanan v. Consolidated Stores Corp.*, 125 F.Supp.2d 730 (D. Md. 2001); *Hill v. Shell Oil Co.*, 78 F.Supp.2d 764 (N.D. Ill. 1999).

Congress when it amended § 1981 to define "make and enforce contracts" as including "the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship." 42 U.S.C. § 1981(b); H.R. Rep. No. 40-(II), 102 Cong. 1st Sess. 1991, 1991 WL 87020.

Hy-Vee argues there should be a different standard for employment contract cases and retail contract cases because employment contracts are generally longer in duration. OPP. 18 n. 10. Hy-Vee disregards the fact that Congress expressly intended the § 1981 amendments to apply to contexts in addition to the employment context.[10] Hy-Vee also conspicuously ignores (as does the court below) that retail contracts do not conclude at formation.[11] The contractual relationship in a retail setting extends through the implied warranty of merchantability. 400.2-314 RSMo; PET. 3-4. After a sale, consumers are able to return or exchange products and they have recourse against merchants who sell defective products. In any case, the contractual relationship continues at least until the buyer has had a reasonable opportunity to inspect the consumer goods. 400.2-606 RSMo; PET. 5. In this case, Youngblood did not have an opportunity to leave the store, let

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[10]H.R. REP. 102-40(I), *93, 1991 U.S.C.C.A.N. 549, **631 ("[a]lthough section 1981 is most commonly used to remedy employment discrimination, the damage caused by *Patterson* has been extended to other types of contractual relations. Section 210 also would restore that relief. Section 210 further restores the relief once available under federal law in contexts other than employment").

[11]In support of its implausible position that retail transactions do not create a contractual relationship beyond the point of sale, Hy-Vee cites a Prohibition Era criminal case in which the question was: when during a transaction could defendant's intent to purchase illegal whiskey be determined? *Calcara v. United States*, 53 F.2d 767 (8th Cir. 1931).

alone to inspect the contents of the sealed package Hy-Vee sold him. PET. A-3.

As noted by the dissent, "whether Youngblood had been detained and the [product] seized prior to his paying for it, as he was paying for it, or as he was heading for the exit with it should not make a difference under § 1981." And, as Hy-Vee's own counsel has noted, "[L]iability under Section 1981 should not be made to depend upon the purely fortuitous timing" [of a store's discriminatory intervention]. DILLARD REP. 7.

The plain language of the statute and its legislative history establish that Congress clearly intends § 1981 to pertain to racial discrimination that affects one's rights, after a contract is formed. § 1981. *See, Callwood,* at 703; *McCaleb* at 1048.

When the Eighth Circuit panel holds that contractual relationships are cut-off at the point of purchase for § 1981 purposes, the lower court disregards *Hampton* and this Court's opinion in *Rivers v. Roadway Exp., Inc.*, 511 U.S. 298, 298, 114 S.Ct. 1510 (1994) (clarifying that the term "make and enforce contracts" in § 1981 embraces "all phases and incidents of the contractual relationship, including discriminatory contract terminations"); *Andrews v. Lakeshore Rehabilitation Hosp.*, 140 F.3d 1405, 1410 (11th Cir. 1998); *Aiken v. City of Memphis*, 37 F.3d 1155, 1176 (6th Cir. 1994); *see also, Youngblood,* at 857. When Hy-Vee took from Youngblood the item he purchased, before he left the store, Hy-Vee terminated the contract. Even if the contractual relationship were to cease at contract formation, as the circuit court below uniquely holds, an "incident" of that relationship had to include the intent that Youngblood would retain the item, once purchased; Hy-Vee does not allow people to leave its store with grocery items, unless they have entered into a retail sales contract. The dissent explains, "[a] person's right to leave a store where he has purchased an item without being surrounded, detained, and

having the item removed from his possession (and his money not returned) can easily be understood as a 'benefit' of the contract." *Youngblood,* at 859.

The lower court impermissibly narrows § 1981 by selectively reading the statute and opinions dealing with its scope. "The list set forth in subsection (b) of the statute, which gives examples of what might constitute the "making" or "enforcing" of a contract under the [Civil Rights] Act, 'is intended to be illustrative rather than exhaustive.'" *Hampton,* at 1104; H.R. REP. 102-40(I), *91-93, 1991 U.S.C.C.A.N. 549, **630-31 ("Committee intends provision to bar all race discrimination in contractual relations"). The narrow interpretation of § 1981 suggested by Hy-Vee (and adopted by the circuit court below) violates Congressional intent, especially given the statute's remedial purpose and its intended broad construction. *Id.* But, Hy-Vee argues that the statute should not be interpreted broadly, as Congress expressly intended. OPP. 22. In so arguing, Hy-Vee promotes a *Patterson* approach to stifling § 1981 – an approach already disapproved by Congress and this Court. *Id.; See generally, Rivers.* Regardlessly, the Eighth Circuit adopts a position contrary to the First, Sixth, Seventh, Tenth, and Eleventh Circuits, permits Hy-Vee's blatant discrimination in connection with a retail contract, and carves the entire post-formation phase of contractual relations from the protections offered by § 1981.

CONCLUSION

For the above-stated reasons, the petition for certiorari should be granted.

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